

Docket No: 14-0312
Bench Date: 1/28/15
Deadline: 1/28/15

MEMORANDUM

TO: The Commission

FROM: Leslie Haynes and Sonya Teague Kingsley,
Administrative Law Judges

DATE: January 21, 2015

SUBJECT: Commonwealth Edison Company

Annual formula rate update and revenue requirement reconciliation under Section 16-108.5 of the Public Utilities Act.

RECOMMENDATION: Deny the Applications for Rehearing; Grant the AG's Motion, in part, and deny the AG's Motion, in part.

This proceeding concerns Commonwealth Edison Company's ("ComEd") Annual Formula Rate Update and Revenue Requirement Reconciliation under Section 16-108.5 of the Public Utilities Act. On December 10, 2014, the Commission entered its final Order ("Order") in this proceeding. An Application for Rehearing was filed on January 8, 2015 by the Attorney General of the State of Illinois ("AG"). On January 9, 2015, ComEd filed an Application for Rehearing and on January 12, 2015, the Citizens Utility Board and Illinois Industrial Energy Consumers ("CUB/IIEC") jointly filed an Application for Rehearing.

In addition, on January 8, 2015, the AG filed a Motion for Partial Collection of Revenues Subject to Refund ("Motion"). The AG filed a Corrected Motion on January 13, 2015. ComEd and CUB/IIEC responded to the Motion on January 14, 2015. The AG filed a reply to responses on January 16, 2015.

ComEd's Application for Rehearing

ComEd seeks rehearing on the Commission's decision regarding customer care costs. ComEd states that the Commission should grant rehearing for two reasons. First, ComEd asserts that the evidence demonstrates that all customer care costs are properly recovered through distribution rates that are applicable to all customers. Second, even if it is proper to shift some costs away from RES-supplied customers, ComEd believes the Commission should reconsider the shift it approved. ComEd states that, on rehearing, better data and/or more accurate allocators could be developed.

ComEd further states that it does not waive its argument that all of its AIP expense was properly recoverable. ComEd also states that the evidence does not support the Order's use of non-historical billing determinants.

ALJs' Recommendation

The Commission has on several occasions indicated that ComEd did not provide enough evidence to properly allocate the customer care costs. See Docket No. 08-0532, Docket No. 13-0387. Having lost the issue, ComEd now proposes to do a proper study. The ALJs recommend that rather than granting rehearing, ComEd should spend the time before its next annual rate increase filing ensuring that it will be able to present the Commission with enough evidence to make a proper allocation of these costs.

It is unclear whether ComEd seeks rehearing on the AIP expense and billing determinants issues. If this is the case, the ALJs recommend that the Commission deny rehearing on these issues because ComEd has failed to present any new or additional evidence or information to warrant rehearing on these issues.

CUB/IIEC's Application for Rehearing

CUB/IIEC ask for rehearing on the issue concerning calculation of the reconciliation balance on which interest is determined. CUB/IIEC argue that the Commission erred in not calculating the balance net of accumulated deferred income taxes ("ADIT"). CUB/IIEC complain that the Commission's Order lacked analysis and merely relied on a restatement of the conclusion on this issue from Docket No. 13-0553.

CUB/IIEC also argue that an Appellate Court decision regarding Ameren Illinois Company directly applies and provides support for CUB/IIEC's position. *Ameren Illinois Co. v. Illinois Commerce Commission, et al.*, 2013 IL App (4th) 121008. CUB/IIEC state that the Commission's Order allows ComEd to recover interest on both a loan it never took out and a cash outlay it did not make. CUB/IIEC argue that this is inconsistent with the court's decision in the *Ameren* case because the Energy Infrastructure Modernization Act ("EIMA") ratemaking process is not designed to allow for the recovery of costs beyond what would normally be recoverable in a ratemaking case.

ALJs' Recommendation

The Commission has rejected this argument in several previous decisions and CUB/IIEC provided insufficient reason to overturn the Commission's decisions. The *Ameren* case cited by CUB/IIEC was relied on in an Application for Rehearing filed in Docket 13-0553 as a reason for granting rehearing, but notably the Commission did not grant rehearing based on the *Ameren* decision in that docket. The ALJs believe that the Order is consistent with prior decisions and that CUB/IIEC give no reason for granting rehearing. The ALJs recommend denying the CUB/IIEC Application for Rehearing.

AG's Application for Rehearing

The AG seeks rehearing on the Commission's rejection of (i) the recommendation made by the AG that the reconciliation balance associated with ComEd's 2013 revenue requirement be reduced by deferred income tax for purposes of calculating interest thereon, pursuant to Section 16-108.5(d) of the Act, and the rejection of (ii) the

recommendation made by the AG to disallow all of ComEd's 2013 Annual Incentive Program ("AIP") expense from recovery.

With respect to the calculation of the reconciliation balance, the AG argues that a decision by the Fourth District Appellate Court is controlling law and that it specifically authorizes the Commission to apply relevant ratemaking principles and treat deferred income taxes as non-shareholder funds that should not receive interest as shareholder funds. *Ameren Ill. Co. v. Ill. Comm. Comm'n*, 2013 IL App (4th) 121008 (Dec. 11, 2013). The AG states that in order to be consistent with the Court's holding, established regulatory principles, and the Public Utilities Act (the "Act"), the Commission should deduct deferred taxes from the reconciliation balance for purposes of calculating interest on that balance.

For the incentive compensation issue ("AIP"), the AG argues that because the Commission's Order found that ComEd's AIP was "impacted by" the earnings per share of Exelon Corporation, Section 16-108.5(c)(4)(A) of the Act is clear that the entire AIP incentive compensation amount could not be recovered. The AG further asserts that the Commission's adoption of a 102.9% recovery level is not supported by the record.

ALJs' Recommendation

The Commission has rejected the argument regarding calculation of the reconciliation balance in several previous decisions and the AG provided insufficient reason to overturn the Commission's decisions. The *Ameren* case cited by the AG was relied on in an Application for Rehearing filed in Docket 13-0553 as a reason for granting rehearing, but notably the Commission did not grant rehearing based on the *Ameren* decision in that docket. The ALJs believe that the Order is consistent with prior decisions and that the AG gives no reason for granting rehearing.

With respect to the AIP issue, the AG raises no new arguments or evidence. Thus, there is no basis for rehearing.

The ALJs recommend denying the AG's Application for Rehearing. As discussed below, however, the ALJs agree with the AG that there is a likelihood of success on appeal and believe that it would be appropriate to grant the AG's Motion as it pertains to the reconciliation balance issue.

AG's Motion

AG's Position

The AG requests that the Commission order that revenues collected in calendar year 2015 relating to the interest on the reconciliation balance and the AIP incentive compensation issue be collected subject to refund.

In particular, the AG notes that it has appealed the Commission's decision on this same reconciliation balance issue in Docket No. 13-0553 and that appeal is pending. The AG points out that the Commission's decision in this docket restates the conclusion reached in Docket No. 13-0553 and the Commission stated that it had found no reason to reach a different conclusion in this docket. Importantly, the Commission, in Docket No. 13-0553, found the AG's position to have merit, but that the Commission lacked authority to implement it.

The AG also argues that the Commission's direction in this docket to "recalculate the interest on the reconciliation balance" following a hypothetical future Appellate Court ruling favorable to the AG is unclear. To clarify its intent, the AG asserts that the Commission should order ComEd to collect the reconciliation ADIT interest revenues subject to a refund pending judicial resolution of the AG/CCI proposed adjustment in Docket No. 13-0553 or in this Docket No. 14-0312, whichever occurs earlier.

The AG argues that such an order is necessary to preserve the status quo and to prevent irreparable harm to ComEd customers who will be required to pay an additional \$12 million in 2015 electric delivery charges because of the Commission's decision.

The AG asserts that the Commission should also order ComEd to collect the revenues (\$70,188,670) associated with the AIP incentive compensation issue subject to refund. The AG states that the Commission's decision violates Section 16-108.5(c)(4)(A) of EIMA and Section 10-201(e)(iv)(C) and thus constitutes reversible error.

The AG states that it seeks alternative relief to a stay, i.e. a partial collection of revenues subject to refund dating from January 1, 2014. According to the AG, when deciding whether to grant the Motion, the Commission should be guided by the same factors traditionally used by courts when evaluating whether a stay is appropriate: 1) the irreparable harm petitioners will suffer if the stay (or collection subject to refund) is denied; 2) the harm to other parties that would result from the issuance of a stay (or collection subject to refund); and 3) the petitioner's likelihood of prevailing on the merits. The AG asserts that all factors have been met. According to the AG, collecting rates subject to refund is a less dramatic equitable remedy than a full stay and protects ratepayers from unlawful and excessive rates that could not otherwise be refunded. The AG also points out that its alternative stay request does not harm ComEd because in the event ComEd wins on appeal, it will get to keep the collected revenue.

The AG concludes its Motion by stating that its Motion is timely and appropriate and directs the Commission's attention to a similar request which was granted by the Commission in Docket Nos. 11-0280/11-0281 (consol.).

In reply to ComEd, the AG argues that its requested relief does not violate the rule against retroactive ratemaking because both collecting rates subject to a refund and a stay constitute equitable relief permitted by both the PUA and the Illinois Supreme Court rules. See 220 ILCS 5/10-113 and Supreme Court Rule 335(g). The AG also notes that the Commission's recent decision in Docket No. 14-0316 authorizes the Commission to make the changes suggested here in an annual formula rate update.

CUB/IIEC's Position

CUB/IIEC support the portion of the AG's Motion pertaining to the calculation of interest on the reconciliation balance.

ComEd's Position

ComEd opposes the AG's Motion. ComEd argues that the Commission is prohibited by the rule against retroactive ratemaking from ordering ComEd to collect revenue subject to refund. ComEd states that because the AG is not requesting a stay, the rates approved by the Commission remain effective during the pendency of any appeal.

According to ComEd, the AG's request regarding the reconciliation balance cannot be granted in this docket because it is a change in the structure of the rate formula. ComEd argues that any such change cannot be made in an annual formula rate update proceeding. Also, ComEd notes that Section 5/16-108.5(d) provides that any change to the formula rate structure must be applied prospectively in the next annual proceeding.

ComEd also asserts that the AG is unlikely to succeed on the merits. ComEd points out that the Commission has consistently calculated interest on the reconciliation balance, without any adjustment for ADIT, in five separate cases: Docket Nos. 11-0721, 12-0321, 13-0386, 13-0553 and 13-0318. ComEd also points out that the Commission was aware of the *Ameren* case relied on by the AG when the Commission denied the AG's Application for Rehearing in Docket No. 13-0553. ComEd maintains that the Commission's decision is consistent with Section 16-108.5(d)(1) and notes the Commission's statement in Docket No. 13-0553 that "where the Act does intend that adjustments be made to an amount of a balance, it has done so specifically."

For the incentive compensation issue, ComEd asserts that the AG's arguments are equally unpersuasive. ComEd points out that the Commission found ComEd's "Key Performance Indicators" to be consistent with EIMA and beneficial to ratepayers. ComEd argues that the Commission exercised its discretion and adopted a reasonable proxy to allow for recovery of only the reasonable and prudent expenses associated with incentive compensation for ComEd employees. ComEd maintains that this is consistent with the statute and the AG is thus unlikely to succeed on the merits.

ALJs' Recommendation

The ALJs recommend that the Commission grant the AG's Motion, in part, and deny the Motion, in part. In particular, for the calculation of the reconciliation balance, the ALJs agree that the AG's Motion provides a reasonable clarification of the Commission's Order. The Commission directed ComEd to "recalculate the interest on the reconciliation balance" following a hypothetical future Appellate Court ruling favorable to the AG. The ALJs recommend that in order to fully effectuate this statement, the AG's Motion should be granted for this issue.

Although ComEd argues that the Commission lacks authority to grant the AG's Motion, the Commission granted a similar AG Motion in Docket Nos. 11-0280/11-0281 (cons.) concerning a rate case for North Shore Gas Company and The Peoples Gas, Light and Coke Company. In recommending such action, the ALJs in those dockets noted that Section 10-113(a) of the Act provides in part:

. . . An application for rehearing shall not excuse any corporation or person from complying with and obeying any rule, regulation, order or decision or any requirement of any rule, regulation, order or decision of the Commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, *except in such cases and upon such terms as the Commission may by order direct.* (emphasis added)

The ALJs in Docket Nos. 11-0280/11-0281 (consol.) suggested that the quoted language could be understood to mean that the Commission has the latitude to order that money collected be refundable pursuant to a future court order or to fashion other equitable relief in the context of a petition for rehearing. The Commission found this notion valid in Docket Nos. 11-0280/11-0281 (consol.). The three-part standard used by the AG is an appropriate standard and consistent with past practice.

The ALJs recommend that the Commission find that application of the three-part standard results in a ruling in the AG's favor. By granting the Motion, ratepayers will be protected and receive a refund if the AG prevails on appeal. In the absence of the Motion being granted, ratepayers would never receive a refund if an appellate court determines that ComEd is not entitled to interest on money it has not spent (for the period prior to the appellate court determination). Thus, ratepayers will experience irreparable harm if the Motion is not granted.

As for harm to ComEd, it is still able to collect the revenue associated with the interest on its ADIT. If ComEd prevails on appeal, it would keep the revenue. Notably, ComEd has not demonstrated that any harm would actually occur. Also, the AG stands a fair chance of prevailing on the merits. Indeed, the Commission has recognized that the AG's position has merit and the *Ameren* decision favors the AG's position.

The ALJs recommend granting the AG's Motion for this issue, because the AG has satisfied the requirements for granting a stay but are asking for a less harsh equitable remedy. The ALJs recommend that in order to effectuate the Motion upon granting it, the Commission should direct the Chief Clerk to include the following language with the Notice of Commission Action:

Notice is hereby given that the Commission in conference on January 28, 2015, GRANTED, IN PART, The People Of The State Of Illinois' Motion For Partial Collection Of Revenues Subject To Refund, filed on January 8, 2015. Pursuant to Section 10-113 of the Public Utilities Act ("PUA"), Commonwealth Edison Company ("ComEd") is directed to collect \$12.565 million subject to refund in the event a reviewing court enters a decision adverse to it related to its reconciliation interest calculation. Allowing for a refund is consistent with one of the purposes of Section 16-108.5 of the PUA, which is to allow utilities to recover actual expenditures. A reconciliation interest calculation including ComEd's accumulated deferred income tax balance is seemingly not consistent with this purpose.

Related memoranda will be available on our web site (www.icc.illinois.gov/e-docket) in the docket number referenced above.

With respect to the AIP incentive compensation issue, the ALJs do not recommend granting the AG's Motion. In the ALJs' view, there is difference between the two issues. For the reconciliation issue there is a question of whether ComEd is collecting interest on an inflated reconciliation balance, but for the AIP issue, ComEd indisputably paid the

employees' salaries. In addition, there is no pending appeal of this issue lingering from a previous annual rate filing and the Commission has not previously recognized the validity of the AG's position. Thus, the ALJs recommend denying the AG's Motion for this issue.

LH/STK:jt